ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	IB Docket No. 98-192
Direct Access to the	)	File No. 60-SAT-ISP-97
INTELSAT System	)	
	)	
To: The Commission	)	

OPPOSITION OF COMSAT CORPORATION TO "SUPPLEMENTAL COMMENTS OF WORLDCOM, INC. ON LIMITED PETITION FOR RECONSIDERATION"

Lawrence W. Secrest, III
Daniel E. Troy
Kenneth D. Katkin

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Warren Y. Zeger
Howard D. Polsky
Keith H. Fagan

COMSAT CORPORATION
6560 Rock Spring Drive
Bethesda, Maryland 20817
(301) 214-3000

July 6, 2000

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SUMMARY

Section 201(c)(2) of the Communications Satellite Act of 1962 ("Satellite Act") vests the Commission with authority to regulate the "charges, classifications, practices, regulations, and other terms and conditions" by which U.S. carriers and users obtain access to the INTELSAT system. 47 U.S.C. § 721(c)(2). Moreover, Section 201(c)(11) of the Satellite Act authorizes the Commission to "make rules and regulations to carry out the provisions of [the Satellite Act]." 47 U.S.C. § 721(c)(11). Pursuant to these express grants of statutory authority, and after considering extensive public comments on the issue, the Commission in its September 1999 *Direct Access Order* adopted a policy to permit COMSAT to collect a "Signatory expense surcharge" from U.S. direct access users. This Signatory surcharge is based on the defined categories of costs that COMSAT unavoidably must incur in performing its statutory role as U.S. Signatory to INTELSAT on behalf of all U.S. users of the system. *See Direct Access Order*, ¶¶ 56-62. Moreover, the FCC directed COMSAT to file a tariff with the agency to collect the Signatory surcharge from direct access users.

Subsequently, in March 2000, Section 641(a) of the newly enacted ORBIT Act effectively codified the *Direct Access Order* by permitting U.S. carriers and users "to obtain direct access to INTELSAT telecommunications services and space segment capacity through purchases of such capacity or services from INTELSAT." 47 U.S.C. § 765(a). Contrary to WorldCom's contention, however, ORBIT did not repeal the Signatory expense surcharge, either expressly or by implication. To the contrary, ORBIT expressly maintained COMSAT's role as the sole U.S. Signatory until INTELSAT is privatized. *See* ORBIT § 642(a)(2), 47 U.S.C. § 765a(a)(2). Thus, WorldCom's proposed construction of ORBIT finds no support in the statute's text. Rather, it is affirmatively refuted both by well-established canons of statutory interpretation

and administrative law, and by the legislative history of ORBIT. Moreover, WorldCom's proposed construction of ORBIT would effect an unconstitutional taking of COMSAT's property, and must therefore be avoided.

Nor has there been any change, since September 1999, in the underlying bases that led the Commission to authorize the Signatory expense surcharge. Accordingly, the Commission should reject WorldCom's untimely invitation to reopen a lengthy and fact-intensive proceeding that it has only recently concluded.

In any event, the Commission should dismiss WorldCom's untimely pleading as not acceptable for filing. Specifically, WorldCom has failed to comply with the statutory requirement that petitions for reconsideration must be filed within 30 days of publication of the FCC order complained of. *See* 47 U.S.C. § 405(a). Indeed, WorldCom filed a separate pleading stating any grounds why its "supplement" should be accepted out of time. *See* 47 C.F.R. § 1.429(d). Indeed, WorldCom has failed even to file its "supplement" within 30 days of the release of the *BTNA Waiver Order*, which it cites indirectly as justification for its untimely filing.

For all of these reasons, WorldCom's "Supplemental Comments" must be dismissed.

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OPPOSITION OF COMSAT CORPORATION TO "SUPPLEMENTAL COMMENTS OF WORLDCOM, INC. ON LIMITED PETITION FOR RECONSIDERATION"

COMSAT Corporation ("COMSAT"), by its attorneys, hereby opposes the untimely "Supplemental Comments" filed by WorldCom, Inc. ("WorldCom") in the above-captioned proceeding ("*Supplemental Comments*"). In its late-filed *Supplemental Comments*, WorldCom now claims that the Commission's *Direct Access Order*[1] was repealed by implication when the ORBIT Act was enacted, and is now a nullity.

Even assuming that WorldCom's untimely petition may be accepted for filing, the *Supplemental Comments* is devoid of any merit whatsoever. Section 641 of the ORBIT Act[2] did not repeal or supplant the *Direct Access Order*. Rather, the provision simply codified the

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[1] *Direct Access to the INTELSAT System*, 14 FCC Rcd 15703 (1999) ("*Direct Access Order*"), *appeal dismissed*, No. 99-1412 (D.C. Cir. Mar. 29, 2000).

[2] Pub. L. No. 106-180, § 641, 114 Stat. 48, 55 (2000), *codified in pertinent part at* 47 U.S.C. § 765 (enacted Mar. 17, 2000).

agency's elimination of COMSAT's exclusive access to INTELSAT and the Order's general principles authorizing Level 3 direct access, while leaving the *Order* itself to govern the specific details of direct access to INTELSAT. WorldCom's assertion to the contrary finds no support in the language of the Act. Moreover, WorldCom ignores the most fundamental statutory basis in ORBIT for the surcharge — *i.e.*, ORBIT's retention of COMSAT's role as the sole U.S. Signatory to INTELSAT until a pro-competitive privatization is achieved.

Nor does the continuing validity of the *Direct Access Order* depend on any inquiry into the legislative history of unenacted pre-ORBIT satellite bills in the 105th and 106th Congresses. Instead, the Commission should simply give full effect both to the plain language of ORBIT and to its own *Direct Access Order*. Indeed, to do otherwise in the present case would raise substantial constitutional questions that the Commission should avoid.

BACKGROUND

In September, 1999, the Commission adopted "a policy to allow direct access to [INTELSAT] from earth stations located within the United States, for the purpose of providing international satellite services." *Direct Access Order*, ¶ 1. This policy supplanted a previous one of more than three decades duration, under which COMSAT—as the sole designated U.S. participant in INTELSAT, *see* 47 U.S.C. §§ 701(c), 735—had an exclusive franchise in the provision of INTELSAT satellite services as well as certain statutorily required functions as the U.S. Signatory.

In implementing the transition to direct access, the Commission found that although COMSAT would no longer enjoy an exclusive franchise, it was nonetheless entitled to "recover costs that are unavoidable, non-discretionary Signatory-related functions and expenses that Comsat will continue to incur even after the implementation of direct access." *Direct Access*

Order, ¶ 60. Specifically, COMSAT's unavoidable "Signatory function expenses" include, among other things, COMSAT's costs of:

> (1) attending and preparing for INTELSAT meetings; (2) participating in the U.S. Government instructional process; (3) protecting its investment in INTELSAT; (4) representing the interests of U.S. carriers and users within INTELSAT; and (5) observing the implementation of procedures for assigning space segment capacity to users.

Id. ¶ 56. The Commission found that these activities constitute "unique" and "non-discretionary Signatory-related functions that Comsat cannot proportionally reduce after the implementation of direct access." *Id.* ¶ 61. In addition, the Commission found that COMSAT's "Signatory activities directly benefit potential users of direct access because Comsat must represent all U.S. interests in connection with INTELSAT decision-making." *Id.*

For these reasons, the Commission determined that "it is appropriate that Comsat be compensated for direct Signatory-related expenses in addition to IUC payments." *Id.* ¶ 62. Indeed, the Commission stated that "*[i]t would be unfair to Comsat* to allow an unavoidable, non-discretionary expense, such as those incurred by the Signatory function, to reduce that return." *Id.* (emphasis added). Accordingly, the Commission held that "such expenses should be included in a surcharge [paid to COMSAT] because they are incurred as a result of the role Congress gave Comsat and mandated by the Satellite Act, and because they are likely to produce value for those customers who take advantage of direct access." *Id.* ¶ 60. The Commission calculated that a surcharge initially set at a level equal to 5.58 percent of INTELSAT's IUC rates

was reasonable for the first year of direct access, and COMSAT accepted the agency's surcharge figure in its first tariff filing. *Id.* ¶ 72.[3]

On November 8, 1999, WorldCom and Sprint Communications Company L.P. ("Sprint") filed a joint "Petition For Limited Reconsideration" of the *Direct Access Order* ("*Limited Petition*").[4] In the *Limited Petition*, WorldCom and Sprint took great pains to proclaim their intention to "seek reconsideration of the Direct Access Order *on only one issue*: the Commission's depreciation calculation with respect to the portion of the direct access surcharge relating to COMSAT's capitalized insurance expenses." *Limited Petition* at 1 (emphasis added). In essence, the *Limited Petition* asked the Commission to correct what WorldCom and Sprint alleged was a basic computational error in the surcharge calculation. *Id.* at 1-2.

On December 6, 1999, with the *Limited Petition* still pending, the *Direct Access Order* and COMSAT's surcharge tariff became effective. Subsequently, on March 17, 2000, the ORBIT Act was enacted. Section 641(a) of ORBIT codified the Commission's direct access policy, by providing:

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[3] In addition to permitting COMSAT to recover certain Signatory function expenses, the 5.58% surcharge is designed to allow COMSAT to recover certain—but not all—of COMSAT's satellite launch and post-separation insurance expenses. *Direct Access Order*, ¶ 66. Like COMSAT's Signatory function expenses, the Commission found that these specified insurance expenses are "reasonably related to its Signatory responsibilities, and . . . not . . . discretionary in nature." *Id.*

[4] Subsequently, in order to seek judicial review while its then-merger partner WorldCom simultaneously continued to seek limited agency reconsideration, Sprint "withdr[ew] as a party to the Petition For Limited Reconsideration . . . and abandon[ed] its challenge in the Petition to the *Direct Access Order*." *Withdrawal of Petition For Limited Reconsideration of Sprint Communications Company L.P.*, IB Docket No. 98-192, File No. 60-SAT-ISP-97 (filed Dec. 22, 1999).

> (a) ACCESS PERMITTED- Beginning on [the date of enactment of this title], users or providers of telecommunications services shall be permitted to obtain direct access to INTELSAT telecommunications services and space segment capacity through purchases of such capacity or services from INTELSAT. Such direct access shall be at the level commonly referred to by INTELSAT, [on the date of enactment of this title], as 'Level III'.

ORBIT § 641(a), *codified at* 47 U.S.C. § 765(a) (enacted Mar. 17, 2000).

On June 20, 2000, more than three months later, WorldCom filed "Supplemental Comments" regarding the Petition For Limited Reconsideration that it filed in this proceeding on November 8, 1999." *Supplemental Comments* at 1. In these *Supplemental Comments*, WorldCom, for the first time, requested that the direct access Signatory surcharge be eliminated entirely.

COMSAT hereby opposes WorldCom's untimely request.

ARGUMENT

I. ORBIT Did Not Repeal the Signatory Surcharge Adopted in the *Direct Access Order*.

A. The Commission Should Not Presume That ORBIT Effected a "Repeal By Implication" of the *Direct Access Order*.

In September 1999, the Commission adopted the 113-page *Direct Access Order*, in which it authorized COMSAT, *inter alia*, to collect a modest Signatory surcharge from U.S. direct access users of the INTELSAT system. *See Direct Access Order*, ¶¶ 56-62. Six months later, Congress enacted the ORBIT Act, of which only a single half-page provision (Section 641) addresses direct access. As WorldCom candidly admits, the ORBIT provision does not address the issue of COMSAT's Signatory surcharge. *See Supplemental Comments* at 3 (admitting that "the ORBIT Act . . . [is] silent on the direct access surcharge"). Nonetheless, WorldCom now

contends that ORBIT's silence has repealed by implication, at a minimum, the portion of the *Direct Access Order* providing for a Signatory surcharge.

Of course, a newly enacted statute will not be construed to have repealed a pre-existing agency rule by implication. *See TVA v. Hill*, 437 U.S. 153 (1978).[5] In *Hill*, for example, the EPA (acting pursuant to the Endangered Species Act) enacted administrative rules declaring the "snail darter" to be an endangered species and prohibiting new construction projects within the snail darter's "critical habitat area." 437 U.S. at 161-62. Subsequently, Congress, by statute, appropriated funds to construct a dam inside the snail darter's critical habitat area (as defined in the EPA rule). *Id.* at 163-64. Indeed, additional funds to build the dam were again appropriated in several subsequent statutes. *Id.* at 167, 170, 192.

Nonetheless, the Supreme Court held that Congress's series of appropriations acts (which were silent on the issue of the "snail darter") *did not* repeal the EPA's rules by implication. *Id.* at 189-90. Instead, the Court noted that EPA's "snail darter" rules themselves had been promulgated pursuant to "the requirements of the Endangered Species Act." *Id.* at 189. Accordingly, the Court reasoned that, "in the absence of some affirmative showing of an

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[5] The *Hill* case reflects the well-known canon that "repeals by implication are not favored and will not be found unless an intent to repeal *is clear and manifest*." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (emphasis added). Because agency rules "duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act . . . have the force and effect of law," *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000), preexisting administrative rulemaking orders are no more subject to repeals by implication than are preexisting statutes. *See TVA v. Hill*, 437 U.S. 153 (1978) (discussed in main text). Indeed, an FCC rule, such as the *Direct Access Order*, "that is intended to have and does have the force of law . . . is binding upon all persons, and on the courts, *to the same extent as a congressional statute*." *National Latino Media Coalition v. FCC*, 816 F.2d 785, 787-88 (D.C. Cir. 1987) (emphasis added).

intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Id.* at 190 (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)).

The present situation is entirely analogous, if not more compelling. Here, the FCC (acting pursuant to the Communications Satellite Act of 1962) enacted rules implementing "direct access" to INTELSAT. Subsequently, in ORBIT, Congress codified the broad outlines of the agency's "direct access" rules. ORBIT, however, was absolutely silent on the issue of the Signatory surcharge. Because ORBIT's silence on this issue, however, is easily reconcilable with the Commission's rule authorizing such a surcharge, the rule announced in the *Direct Access Order* may not be repealed by implication. *Cf. Hill,* 437 U.S. at 190 ("[I]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.").[6]

The canon disfavoring repeals by implication applies especially strongly where, as here, it can be ascertained with certainty that Congress was aware of the earlier enactment. ORBIT, after all, is not a free-standing statutory enactment. Rather, by its own terms, it purports to effect

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[6] The case of *Trevan v. Office of Personnel Management*, 69 F.3d 520 (Fed. Cir. 1995), cited by WorldCom, actually undermines WorldCom's assertion that Congress's enactment of ORBIT somehow repealed the *Direct Access Order* by implication. In fact, by holding that an individual could qualify as "disabled" under agency rules promulgated pursuant to the Social Security Act, while simultaneously *not* qualifying as "disabled" under the Federal Employees Retirement System Act, *Trevan* actually provides an example of a subsequently enacted statute having *no effect* upon an agency's determination made under the previously enacted statute. *Compare Supplemental Comments* at 4-5 (asserting otherwise). Similarly, just as the newly enacted Federal Employees Retirement System Act in *Trevan* had no effect on preexisting agency rules promulgated pursuant to the Social Security Act, ORBIT here has no effect on the Signatory expense surcharge rule previously adopted by the Commission pursuant to the Satellite Act.

certain amendments to the Communications Satellite Act of 1962 ("Satellite Act"),[7] pursuant to which the *Direct Access Order* was promulgated.[8] Accordingly, ORBIT must be construed *in pari materia* with the Satellite Act.[9]

Section 201(c)(11) of the Communications Satellite Act of 1962 ("Satellite Act") authorizes the Commission to "make rules and regulations to carry out the provisions of [the Satellite Act]." 47 U.S.C. § 721(c)(11). Section 201(c)(2) of the Satellite Act directs the Commission regulate the "charges, classifications, practices, regulations, and other terms and conditions" by which U.S. carriers and users may obtain access to the INTELSAT satellite system. 47 U.S.C. § 721(c)(2). Not even WorldCom contends that ORBIT repealed these particular Satellite Act provisions, either by implication or otherwise. But if the statutory provisions underlying the Commission's adoption of the *Direct Access Order* remain in effect, then it is difficult to discern any basis, at this late date, for questioning the fruit of the

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[7] *See* ORBIT § 3 (providing that "[t]he Communications Satellite Act of 1962 (47 U.S.C. 701) is amended by adding at the end the following new title: "TITLE VI—COMMUNICATIONS COMPETITION AND PRIVATIZATION," which contains all operative provisions of ORBIT).

[8] *See Direct Access Order*, ¶ 206 (setting forth the various statutory provisions providing authority underlying the *Direct Access Order*). Every provision relied on by the Commission remains in effect today. *Compare* ORBIT § 645(1), 47 U.S.C. § 765d(1) (enacted Mar. 17, 2000) (repealing certain other provisions of the Satellite Act, but *not* repealing any provision enumerated in the ordering clauses of the *Direct Access Order*).

[9] *See Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (statutes that are "*in pari materia*—that is, pertain to the same subject. . . under settled principles of statutory construction, should . . . be construed 'as if they were one law' . . . . The rule is but a logical extension of the principle that individual sections of a single statute should be construed together . . . .") (citations omitted); *see also, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 n.11 (1985) (noting "the fact that the various provisions of [an] Act should be read in *pari materia*. . . .").

Commission's exercise of its statutory authority. *Cf. Hill*, 437 U.S. at 189-90 (holding that the subsequent appropriations acts did not repeal the EPA's "snail darter" rules by implication, *precisely because* those subsequent acts did not repeal the Endangered Species Act, which provided the statutory basis for the EPA rules).[10] *See also* Part II, *infra* (discussing the fact that no facts pertinent to the Signatory surcharge have changed since the *Direct Access Order* was adopted in September 1999).

B. WorldCom's Legislative History Arguments Are Unavailing.

Desperately seeking a basis for its claim that the statutory silence in ORBIT has somehow effected a repeal by implication of the *Direct Access Order*, WorldCom begins by discussing ORBIT's legislative history. "Such reasoning, however, misunderstands [the proper] approach to statutory interpretation." *Carter v. United States*, 120 S. Ct. 2159, 2170 (2000). "In

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[10] Recently, in connection with the implementation of Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), the Commission has frequently upheld its own rules against claims that the rules were implicitly repealed by subsequent legislative enactments. *See, e.g.*, *Regulatory Treatment Of LEC Provision Of Interexchange Services Originating In The LEC's Local Exchange Area*, 12 FCC Rcd 15756, ¶ 168 (1997) (1996 Act provision authorizing FCC to impose structural safeguards on BOCs did not repeal by implication FCC's authority to impose such safeguards on non-BOC independent LECs; there is "no reasonable basis for inferring from [silence in]. . . the 1996 Act, that Congress intended to eliminate [an existing Commission rulemaking order] or to repeal by implication [its] authority to impose on independent LECs separation requirements that we deem necessary to protect the public interest consistent with our statutory mandates"), *modified on recon. in other respects*, 14 FCC Rcd 10771 (1999); *Bell Operating Company Provision of Out-Of Region Interstate, Interexchange Services*, 11 FCC Rcd 18564, ¶¶ 28-29 (1996) ("Congress did not intend by implication to repeal our authority to impose dominant or non-dominant regulatory treatment as we deem necessary to protect the public interest consistent with our statutory mandates."); *U S West Petitions to Consolidate LATAs in Minn. & Ariz.*, 14 FCC Rcd 14392, ¶ 18 & nn.58-60 (1999) (1996 Act's silence regarding state jurisdiction does not repeal by implication the Commission's jurisdiction to preempt certain state pricing rules).

analyzing a statute, we begin by examining the text, not by 'psychoanalyzing those who enacted it.'" *Id.* (quoting *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in judgment) and citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). For this reason, courts "will not, based upon nothing more than [legislative history], attribute to the Congress a definitive intent upon a subject as to which the statute itself is silent." *Lakeshore Broadcasting, Inc. v. FCC*, 199 F.3d 468, 472-73 (D.C. Cir. 1999).

Moreover, given WorldCom's sole reliance on legislative history, the selection of materials in the *Supplemental Comments* is somewhat surprising. In the *Supplemental Comments*, WorldCom cites no Committee Reports, no Hearings, no floor debate, no statements of sponsors or other legislators, no Presidential signing statement, and no press accounts of the process of legislative deliberation. Nor could it. These traditional tools of legislative history analysis, where relevant at all, point uniformly in the direction of preserving the Signatory surcharge. Indeed, by explicitly preserving COMSAT's role as the sole U.S. Signatory until privatization, the very basis for the surcharge—*i.e.*, the unavoidable costs associated with that function – remains unaffected.

In any case, on the Senate floor, Senator Sarbanes (an ORBIT conferee) noted that the statute, as enacted, "says nothing about the signatory fee that COMSAT is entitled to receive from direct access users as determined by the FCC's direct access order made effective December 6, 1999." 146 Cong. Rec. S1504 (daily ed. Mar. 21, 2000). To clarify any ambiguity that this silence might create, the Senator specifically stated:

> [I]t is the intent of the conferees *to preserve this signatory fee to compensate COMSAT for the costs it incurs as the U.S. signatory*

> to INTELSAT during its brief transition to a procompetitive privatization.
>
> Nothing in the conference agreement is intended to vacate the FCC's 'Level III direct access' order made effective December 6, 1999, *including its assessment of a signatory fee to be charged to direct access users to offset COMSAT's signatory costs.*

Id. at S1504-05 (emphasis added). No legislator, in contrast, objected to Sen. Sarbanes's statement. Nor did any legislator ever offer any contrary interpretation of ORBIT.

Perhaps for this reason, WorldCom's entire legislative history analysis rests entirely on its own strained speculations about the reasons why certain language contained in ORBIT predecessor bills allegedly remained unenacted. Reliance on the legislative history of *unenacted provisions* to determine the meaning of a statute is unavailing under any circumstances.[11] In the administrative context, it is especially so. Congressional action that does not codify an agency rule obviously does not signify Congressional rejection or disapproval of the rule. In *Airmark Corp. v. Federal Aviation Administration*, 758 F.2d 685, 689-91 (D.C. Cir. 1985), for example, Congress rejected a proposal to codify, as part of the Aviation Safety and Noise Abatement Act of 1979, an existing FAA rule exempting certain aircraft carriers from certain aircraft noise control regulations. Although four competitors of an exempt carrier later alleged that Congress's decision not to codify the FAA rule signified its rejection of the rule, the D.C. Circuit held to the contrary. *Id.* In fact, in upholding the rule, the court stated that Congress likely omitted the

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[11] *See, e.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."); *cf. Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (declining to find a repeal by implication where the "silence in the text is matched by silence in the statute's legislative history").

disputed language precisely because it recognized that FAA already had the power to grant the exemptions. *Id.* at 691. Similarly, ORBIT's silence on the Signatory surcharge issue is most properly construed to express Congress's approval—rather than any disapproval—of the Commission's decision to authorize the surcharge.[12]

Finally, it must be noted that the unenacted provisions cited by WorldCom do not, in fact, indicate that Congress first decided to authorize a Signatory surcharge, and then later retreated from that decision. *Compare Supplemental Comments* at 3-4. The first bill discussed by WorldCom (H.R. 1872, 105th Cong.) made no mention of any Signatory surcharge.[13] Rather, that bill would merely have conditioned the implementation of direct access upon the FCC's determination that the INTELSAT IUC rate itself was adequate to compensate COMSAT for its Signatory expenses.[14] In fact, the Commission ultimately made a contrary finding. *See Direct*

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[12] *See Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (a "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress") (quoting *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267, 275 (1974)); *see also Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 2329, ¶ 34 & n.54 (2000) (noting that "the Supreme Court has inferred congressional ratification of administrative action from 'nothing more than silence in the face of an administrative policy'") (citing *Haig v. Agee*, 453 U.S. 280, 300 (1981) (citing *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) and other Supreme Court cases)).

[13] The relevance of H.R. 1872—even to WorldCom's argument—is not clear. Although H.R. 1872 passed the House in the 105th Congress, the bill died when the 105th Congress was adjourned at the end of 1998. The successor House bill introduced in the 106th Congress, in contrast, never contained the language discussed by WorldCom. Rather, that bill, H.R. 3261, from its date of introduction, contained precisely the same language on direct access that ultimately was enacted in ORBIT. *See* H.R. 3261, 106th Cong. § 641 (introduced Nov. 9, 1999), *reprinted in* 146 Cong. Rec. H11931-32 (daily ed. Nov. 10, 1999). Accordingly, no language was ever "deleted" from H.R. 1872, at Conference or otherwise.

[14] *See* H.R. 1872, 105th Cong., § 3 (adding proposed § 641(1)(A)(i) to the Satellite Act).

Access Order, ¶ 62 (rejecting the contention that the INTELSAT IUC is "adequate to compensate Comsat for Signatory-related costs . . . [and] find[ing] that it is appropriate that Comsat be compensated for direct Signatory-related expenses in addition to IUC payments."). Accordingly, under H.R. 1872, direct access to INTELSAT could not even have been implemented.

The discussion of S. 376 in the *Supplemental Comments* is even more inapposite. According to WorldCom, an allegedly "unenacted" provision of that bill concerning exclusive international telecommunications traffic arrangements "apparently would have prohibited the Commission from eliminating COMSAT's direct access surcharge." *Supplemental Comments* at 4 (discussing "proposed section 635(b) to Communication [*sic*]Act"). In fact, however, the provision cited by WorldCom *was* enacted, along with the rest of S. 376 *See* ORBIT § 648, 114 Stat. 48, 57 (2000), *codified at* 47 U.S.C. § 765g (enacted March 17, 2000) (setting forth the statutory language discussed by WorldCom in the *Supplemental Comments*).[15] Accordingly, according to WorldCom, ORBIT "apparently . . . prohibit[s] the Commission from eliminating COMSAT's direct access surcharge. *Supplemental Comments* at 4.

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[15] ORBIT Section 648 provides: "EXCEPTION- In enforcing the provisions of this subsection, the Commission shall not require the termination of existing satellite telecommunications services under contract with, or tariff commitment to . . . [a] satellite operator [with exclusive foreign arrangements.]" 47 U.S.C. § 765g(b)(1) (enacted Mar. 17, 2000). WorldCom's confusion regarding the enactment of this provision may have been caused by its redesignation from "Section 635" to "Section 648."

C. The ORBIT Act Must Be Construed To Avoid a Taking of COMSAT's Property.

Generally, "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." *United States v. X-Citement Video, Inc.*, 513 U.S. 64-65 (1994); *accord Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems *unless such construction is plainly contrary to the intent of Congress*."). Here, it is "fairly possible" for this Court to construe ORBIT as not prohibiting the continued validity of the *Direct Access Order*. *Cf. X-Citement Video*, 513 U.S. at 65. Indeed, not one single word in ORBIT even addresses—much less repeals—the *Direct Access Order* or the Signatory surcharge adopted therein. Accordingly, it would not be "plainly contrary to the intent of Congress" for the Commission to construe ORBIT to preserve—rather than repeal—the *Direct Access Order*. *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

In contrast, the construction of ORBIT set forth in WorldCom's *Supplemental Comments*, would, at a minimum, necessarily raise substantial constitutional questions. As the Commission has recognized, under direct access, COMSAT—and COMSAT alone—continues to incur certain unavoidable expenses in performing its unique, statutorily required Signatory functions. *Direct Access Order*, ¶¶ 56-62. These Signatory expenditures borne only by COMSAT, however, "directly benefit potential users of direct access because Comsat must represent all U.S. interests in connection with INTELSAT decision-making." *Id.* ¶ 61. Largely for this reason, the Commission determined that COMSAT must "be compensated for direct Signatory-related expenses in addition to IUC payments." *Id.* ¶ 62.

The Commission's determination in the *Direct Access Order* was consistent with the Takings Clause of the Fifth Amendment, which was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))). It reflects a "clear principle of natural equity that the individual whose property is thus sacrificed [for the public good] must be indemnified." *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 166, 179 (1871).

Here, unless COMSAT is reimbursed for its mandatory Signatory activities through the surcharge (or otherwise), direct access would require COMSAT alone to shoulder certain burdens, the benefits of which would be realized primarily by others. Such "A to B" laws have consistently been held to run afoul of the Takings Clause.[16] Whatever public interest benefits direct access may entail, even "a strong public desire to improve the public condition is not

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[16] *See, e.g.*, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (striking down statute requiring coal companies to pay retroactive health benefits to former employees, on ground that "[i]t is against all reason and justice to presume that the legislature has been entrusted with the power to enact a law that takes property from A and gives it to B") (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.)) (internal quotation marks omitted); *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982) (holding that "a general economic regulation which in effect transfers the property interest" from one private entity to another may violate the Takings Clause, because "our cases show that takings analysis is not necessarily limited to outright acquisitions by the government for itself") (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. . . ." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Accordingly, the Commission should construe ORBIT so as to avoid the substantial constitutional questions that would be raised by eliminating COMSAT's Signatory surcharge without implementing an alternative compensation mechanism.[17]

II. Because No Relevant Facts Have Changed since September 1999, ORBIT Provides No Basis for The Commission To Reconsider the Signatory Expense Surcharge.

As demonstrated in Part I, *supra*, the ORBIT Act did not repeal the *Direct Access Order*, either by implication or otherwise. Similarly, the enactment of ORBIT provides no basis for the Commission to now revisit its own conclusions regarding the need for a Signatory surcharge, which it reached less than one year ago. *See Direct Access Order*, ¶¶ 56-62, discussed at page 3, *supra* (identifying five distinct types of "Signatory function expenses" that COMSAT alone must incur on behalf of all U.S. direct access users).

In the *Supplemental Comments*, WorldCom does not dispute the *Direct Access Order*'s finding that COMSAT does, in fact, bear the Signatory function expenses identified by the Commission. Nor does it dispute the *Direct Access Order*'s finding that the benefits of COMSAT's mandatory investments flow to all U.S. direct access users, including WorldCom.

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[17] Such a construction would have the added benefit of being consistent with the Congressional intent that ORBIT should not effect any "takings' of COMSAT's property. *See, e.g.*, 146 Cong. Rec. S1155 (daily ed. Mar. 2, 2000) (statement of Sen. Burns) ("I am especially pleased that the conference agreement rejects [certain proposed ORBIT provisions that] . . . would be contrary to the Fifth Amendment's Takings Clause."); 146 Cong. Rec. H905 (daily ed. Mar. 9, 2000) (statement of Rep. Tauzin) (warning against enactment of provisions that would have effected a "constitutional violation [that] would have subjected the U.S. government—and the taxpayers—to substantial claims for damages.").

Instead, WorldCom simply asserts that these findings are no longer significant. *Supplemental Comments* at 2-3.

WorldCom's contention lacks merit. By law, COMSAT remains the U.S. Signatory. It still incurs the same Signatory costs post-ORBIT. In fact, the mere enactment of "potentially relevant legislation," without a concomitant change in the underlying factual record, does not undermine conclusions that the Commission has recently (and properly) reached.[18] Here, WorldCom does not allege that the underlying facts upon which the Signatory surcharge was predicated have changed since September, 1999. Accordingly, because "nothing has changed,"[19] the enactment of "potentially relevant legislation" alone cannot provide a basis for reconsideration of that surcharge.[20]

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[18] *See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, FCC 00-131, 15 FCC Rcd 7463, ¶ 3 (2000) ("*Public Mobile Services Order*") (declining to reconsider 1994 rule requiring cellular mobile transmitters each to have a unique and unalterable Electronic Serial Number, despite 1998 enactment of "potentially relevant" statute, unless it could be shown *factual* that "anti-fraud practices, technologies and the market for cellular services ha[d] changed considerably" since 1994); *cf. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report & Order*, 15 FCC Rcd 3696, ¶ 355 (1999) ("*Third Local Competition Order*") (refusing to reconsider rules implementing 1996 Act that had been vacated by the 8th Circuit and then reinstated by the Supreme Court, because "[n]othing has changed in the intervening three years" to cause the Commission to question the *factual* basis upon which the 1996 rules were predicated).

[19] *Third Local Competition Order*, ¶ 355.

[20] *Public Mobile Services Order*, ¶ 3.

III. WorldCom's *Supplemental Comments* Are Untimely and May Not Be Accepted for Filing.

A. The *Supplemental Comments* May Not Be Accepted for Filing as a New Petition for Reconsideration.

In the *Supplemental Comments*, WorldCom presents new arguments wholly unrelated to those advanced in its previously filed *Limited Petition*.[21] Indeed, other than in its very first sentence, the *Supplemental Comments* fail even to mention the *Limited Petition* or any issue discussed therein. Accordingly, the *Supplemental Comments* are best characterized as a new petition for reconsideration, rather than a "supplement" to the *Limited Petition*.

The Communications Act expressly provides that all petitions for reconsideration of FCC orders "must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." 47 U.S.C. §405(a); *accord* 47 C.F.R. §1.429(d) (same). That statutory deadline is very strictly construed.[22]

Here, public notice of the *Direct Access Order* was given on October 7, 1999. *See* 64 Fed. Reg. 54561 (Oct. 7, 1999). Accordingly, any and all petitions for reconsideration of that

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[21] As discussed at page 4, *supra*, the *Limited Petition* "seek[s] reconsideration of the Direct Access Order on only one issue: the Commission's depreciation calculation with respect to the portion of the direct access surcharge relating to COMSAT's capitalized insurance expenses." *Limited Petition* at 1. The *Supplemental Comments*, in contrast, do not address that issue. Instead, they seek reconsideration only on a different and more fundamental issue: whether the surcharge should be eliminated entirely.

[22] *See, e.g., Application of Columbia Millimeter Communications*, DA 00-816, 2000 FCC LEXIS 1867 (April 11, 2000) (dismissing as untimely a petition for reconsideration that was filed within the thirty-day deadline at an incorrect Commission address, then refiled at the correct address just one day late); *Goosetown Enters.*, 14 FCC Rcd 18997, ¶ 4 (1999) ("The Commission is without authority to extend or waive the statutory 30-day filing period for petitions for reconsideration specified in Section 405 of the Communications Act.").

Order were due by November 6, 1999, at the latest. The *Supplemental Comments*, however, were not filed until June 20, 2000—more than seven months after the expiration of the statutory deadline. Accordingly, the Commission is barred by statute from accepting the *Supplemental Comments* for filing.

Moreover, even if an intervening change in the law (such as the enactment of ORBIT) were to constitute good cause for an untimely filing, such a change cannot and does not toll the filing clock indefinitely. Rather, under such circumstances, such a change at most would merely restart the 30-day filing clock.[23] Here, as WorldCom is well aware, ORBIT was enacted on March 17, 2000, and took effect immediately. Thus, even assuming *arguendo* that the enactment of ORBIT constitutes "good cause" for WorldCom to submit an untimely petition for reconsideration, such "good cause" would have expired on April 17, 2000—more than two months before the *Supplemental Comments* were filed.

B. The *Supplemental Comments* May Not Be Accepted for Filing as a Supplement to WorldCom's *Limited Petition*.

Understandably seeking to avoid the statutory strictures of Section 405, WorldCom styles its present pleading *not* as a new petition for reconsideration, but rather as mere "supplemental comments regarding the Petition For Limited Reconsideration that it filed in this proceeding on

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[23] *See, e.g., Roy M. Speer*, FCC 99-328, 1999 FCC LEXIS 5648, ¶¶ 7, 11 (Nov. 8, 1999) (accepting a late-filed petition for reconsideration because, *inter alia*, the petition was filed within 30 days after the petitioner received actual notice of the underlying unpublished Commission); *Gary E. Stoffer*, 13 FCC Rcd 14056 (1998) (waiving filing deadline where applicant submitted petition for reconsideration sixteen days after the applicant received actual notice of the underlying unpublished Commission action).

November 8, 1999." *Supplemental Comments* at 1. As discussed above, this characterization is erroneous: the *Supplemental Comments* seek relief that WorldCom has never sought, based on arguments WorldCom has never previously advanced.[24] However, even if WorldCom's characterization of the *Supplemental Comments* were accurate, that characterization would not suffice to cure the pleading's fatal untimeliness.

Instead, it is axiomatic that "[n]o *supplement* to a petition for reconsideration filed after expiration of the 30 day period will be considered, except upon leave granted pursuant to a separate pleading stating the grounds for acceptance of the supplement." 47 C.F.R. §1.429(d) (emphasis added). Here, WorldCom has not been granted any leave to file the *Supplemental Comments* seven months out-of-time. Nor has it filed any separate pleading stating the grounds under which such a late supplement should now be accepted. Accordingly, the *Supplemental Comments* must be dismissed. *See, e.g., Dismissal of All Pending Pioneer's Preference Requests*, 13 FCC Rcd 11485, ¶ 16 (1998) (dismissing late-filed supplement to petition for reconsideration *because* petitioner "did not file a separate pleading requesting leave to file a late-filed supplement"), *rev'd in other respects, Qualcomm Inc. v. FCC*, 181 F.3d 1370 (D.C. Cir. 1999).

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[24] The purpose of a supplement is not to raise entirely new issues or new arguments. Rather, "[a] supplemental pleading is designed to cover matters that occur subsequent to the filing of the [pleading], *but pertain to the original pleadings*." *Albrecht v. Long Island R.R.*, 134 F.R.D. 40, 41 (E.D.N.Y. 1991) (emphasis added); *see also, e.g., Hilliard v. Scully*, 537 F. Supp. 1084, 1090 (S.D.N.Y. 1982) (denying motion to supplement where "[t]he allegations plaintiff seeks to add . . . are factually unrelated to the conduct complained of in plaintiff's original complaint").

C. Nothing in the *BTNA Waiver Order* Cures the Untimeliness of WorldCom's *Supplemental Comments*.

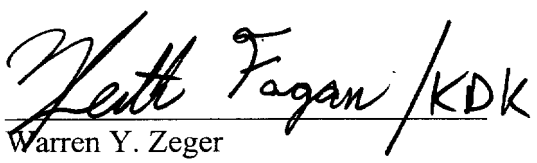
According to WorldCom, "the Commission recently stated explicitly that it would consider [the surcharge] issue in the context of petitions for reconsideration of the Direct Access Order." *Supplemental Comments* at 2 (citing *BT North America Petition for Waiver of Direct Access to INTELSAT System Restriction*, FCC 00-166, IB Docket No. 98-192, ¶ 1 n.2 (rel. May 16, 2000) ("*BTNA Waiver Order*")). In fact, however, WorldCom's *Supplemental Comments* are untimely even if filed in response to the *BTNA Waiver Order*. Specifically, public notice of the *BTNA Waiver Order* was released on May 16, 2000—more than 30 days before the *Supplemental Comments* were filed on June 20, 2000.

Moreover, the *BTNA Waiver Order* did not invite WorldCom (or anyone else) to file any *new* petitions for reconsideration. Rather, *BTNA Waiver Order* states only that "the Commission *may* consider [surcharge] issues in ruling upon petitions *that have been filed* by various parties seeking reconsideration." *Id.* (emphasis added). By this language, the *BTNA Waiver Order* did no more than notify the parties that the Commission would consider this issue in its reconsideration of the *Direct Access Order*. In no way did the *BTNA Waiver Order* invite the parties to submit further briefing on the issue. Accordingly, the Commission must not accept WorldCom's untimely submission.

CONCLUSION

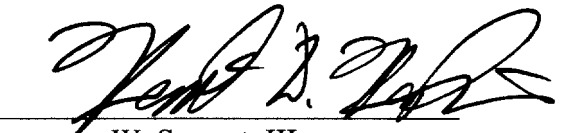
Both because they are untimely and because the *Direct Access Order* remains in full effect, WorldCom's *Supplemental Comments* must be dismissed or denied.

Respectfully submitted,



Warren Y. Zeger
Howard D. Polsky
Keith H. Fagan

COMSAT CORPORATION
6560 Rock Spring Drive
Bethesda, MD 20817
(301) 214-3000



Lawrence W. Secrest, III
Daniel E. Troy
Kenneth D. Katkin

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

July 6, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this sixth day of July, 2000, I caused copies of the foregoing "Opposition of COMSAT Corporation To Supplemental Comments of WorldCom, Inc. on Limited Petition For Reconsideration" to be served by hand to the following:

Donald Abelson
Chief, International Bureau
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Peter Pappas
International Bureau
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

James Ball
International Bureau
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Cathy Hsu
International Bureau
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Michael McCoin
International Bureau
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Douglas Webbink
International Bureau
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Clint Odom
Office of Chairman Kennard
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Alfred M. Mamlet (*)
Maury D. Shenk
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for WorldCom, Inc.

Kent Nakamura (*)
James W. Hedlund
Sprint Communications Co., LLP
401 9th Street N.W.
Washington, D.C. 20036

Michael D. Hays (*)
Raymond Bender
DOW LOHNES & ALBERTSON, P.L.L.C.
1200 New Hampshire Ave., N.W.
Suite 800
Washington, D.C. 20036-6802
Counsel For Lockheed Martin Corp. & COMSAT Government Systems LLP

Lawrence J, Lafaro (*)
Teresa Marrero
AT&T Corporation
295 N. Maple Ave.
Basking Ridge, N.J. 07920

Lori Alexiou

(*) Served by first-class mail, postage prepaid